IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 817.

WHITAKER CABLE CORPORATION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR REHEARING OF ORDER OF APRIL 22, 1957 DENYING CERTIORARI.

Petitioner prays for a rehearing of this Court's order of April 22, 1957 denying certiorari.

OPINION BELOW.

The opinion of the Court below is reported in 239 F. 2d 253.

JURISDICTION.

Jurisdiction is invoked under Section 1254 of the Federal Judicial Code (Title 28 U. S. C. A. Section 1254; 69 Stat. 928).

QUESTION PRESENTED.

Whether the failure of the Court of Appeals to hold its Judgment and Order in abeyance or to exercise its equit-

able powers and original jurisdiction, until the numerous competitors of petitioner who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders; whether such failure by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the court while petitioner's numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and subsequent financial loss; and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of the petitioner.

STATUTE INVOLVED.

Section 2(a) of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13(a), provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them: * * *.

STATEMENT OF GROUNDS FOR REHEARING.

Since March 6, 1957, the date of the filing of the petition for certiorari herein, this court granted certiorari in a question similar to the question presented herein in the case of *Moog Industries, Inc.* v. *Federal Trade Commission*, October 1956 Term, No. 750, Writ of Certiorari granted March 25, 1957, 25 Law Week 3277. In addition there has

since been docketed with this court the case of *E. Edelmann & Company* v. *Federal Trade Commission,* October 1956 Term, No. 900 presenting substantially the same question.

The *Moog Industries* case involves a conflict between 8th Circuit and the 7th Circuit holding in *C. E. Niehoff & Co.* v. *Federal Trade Commission,* 241 F. 2d 37. The *Edelmann* case (*E. Edelmann & Company* v. *Federal Trade Commission* (7th Cir.), 239 F. 2d 152) involves an intra-circuit conflict.

The *Edelmann, Moog, Niehoff* and *Whitaker* cases all belong to a group of Federal Trade Commission complaints against manufacturers of automotive replacement parts. The oral arguments before the 7th Circuit Court of Appeals in the *Edelmann, Niehoff* and *Whitaker* cases were heard consecutively. The *Edelmann* and *Whitaker* opinions were handed down the same day. The Court in its opinion in the *Niehoff* case cites its holdings in the *Edelmann* and *Whitaker* cases as controlling in *Niehoff*. Only in the *Niehoff* case, however, was the court's enforcing order held in abeyance depending upon the future course of the Commission's proceedings against Niehoff's competitors.

Present counsel for this petitioner personally tried both the *Moog* and *Whitaker* cases before the Federal Trade Commission on the same theories and substantially the same evidence. Commissioner Mason's dissent in the *Moog* case was cited as the rationale for his dissent in the *Whitaker* case (R. 476).

The conflict within the 7th Circuit and between the 7th and 8th Circuits present substantial grounds for certiorari available to petitioner although not previously presented.

The intervening circumstance of the granting of the writ in the *Moog* case (Docket No. 750) is of substantial effect on the petition in the *Whitaker* case in view of the questions presented and similarity between them.

It would be unfair, should relief be granted in the *Moog* case, to deny the same to Whitaker.

Petitioner therefore prays for a rehearing of the order of April 22, 1957 denying certiorari.

Respectfully submitted,

EDWIN S. D. BUTTERFIELD,
111 W. Washington Street,
Suite 1740,
Chicago 2, Illinois,
Counsel for Petitioner.

April 25, 1957.

CERTIFICATE OF COUNSEL.

I hereby certify that this petition for rehearing is presented in good faith and not for delay and the petition is restricted to the grounds and question above specified.

Signature .....

EDWIN S. D. BUTTERFIELD,
Counsel for Petitioner.